83-1668

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NO.

in the
Supreme Court
of the
United States

FRED MOSKOWITZ and CLARENCE KOLTUN,

Petitioners,

vs.

SAUL J. MORGAN ENTERPRISES, INC., and NORMAN COHEN, individually and as Trustee,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

ISSUE NO. 1

In a Sherman Act tying case, may a Plaintiff prove the element of coercion by showing an express contractual requirement by which the antitrust plaintiff's future course of action is governed and by which the antitrust plaintiff is compelled to purchase the tied product in the future only from the seller.

ISSUE NO. 2

Did the Eleventh Circuit Court of Appeals and the Trial Court err in finding that Plaintiffs did not demonstrate a sufficient showing of anti-competitive effects in the trial below by disregarding prior decisions of this Court and substituting a different standard than the one set by this Court.

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NO.

in the Supreme Court of the United States

FRED MOSKOWITZ and CLARENCE KOLTUN,

Petitioners,

vs.

SAUL J. MORGAN ENTERPRISES, INC., and NORMAN COHEN, individually and as Trustee,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Fred Moskowitz and Clarence Koltun, Plaintiffs, on behalf of themselves and all others similarly situated, petition for a writ of certiorari to review the judgment

of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on January 27, 1984, *reh. den.*, on March 8, 1984, reported at ____ F.2d ____ (11th Cir. 1984). The Court is requested to decide whether sales by a corporate developer of millions of dollars worth of homes in the United States can be tied by express contract, to the mandatory purchase of recreational or other services or products at inflated cost which grossly exceeds the combined fair market value of the tied and tying products, when the effect of the tie is to substantially foreclose competition in the market for the tied product. The decision appears to be in direct and irreconcilable conflict with decisions of this Court.

OPINIONS BELOW

The Opinion of the Court of Appeals is to be reported at ____ F.2d ____ (11th Cir. 1984), and is annexed hereto as App. 1. The opinion of the United States District Court for the Southern District of Florida is to appear at ____ F.Supp. ____ (U.S. D.C. So.Fla. 1984) and is annexed hereto as App. 2.

JURISDICTION

The Judgment of the Court of Appeals (App. 1) was entered on January 27, 1984. A Petition for Rehearing with a Suggestion of Rehearing En Banc, was timely filed and denied on March 8, 1984 (App. 2). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sherman Act (15 U.S.C. 1) 26 Stat. 209 as amended, which provides in part:

> "Every contract ... in restraint of trade or commerce among the several states ... is declared to be illegal ..."

Sherman Act (15 U.S.C. 2) which provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states ..."

Sherman Act (15 U.S.C. 15) which provides in part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any District Court of the United States in the District in which the Defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained ..."

Sherman Act (15 U.S.C. 26) provides in part:

> "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any Court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the Antitrust

Laws, including Sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . ."

Section 2201 of the Declaratory Judgment Act (28 U.S.C. 2201) which provides in part:

"In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . ."

STATEMENT

This case arose as a result of the phenomenon of residential and commercial condominium ownership which has spread across the several states. Condominium sales in the State of Florida has been explosive, due to the vast number of out of state purchasers and the seemingly unlimited availability of foreign and domestic investment funds.

In a normal situation, the purchaser of a condominium obtains fee simple title to the dwelling or commercial unit and also owns in fee simple, together with the other owners of condominiums in the project, a proportionate share of the common areas such as roadways, exterior walls, pools, tennis courts, lobbies, etc. Thus, both the proportionate share of all common elements *and* the individual dwelling or commercial unit are owned in *fee simple* by the unit owners.

However, in the case *sub judice*, as in many other cases, the situation differs, as a result of a *contractually imposed* tying arrangement.

Here, the vendor of 650 condominium dwelling units, Saul J. Morgan Enterprises, Inc., required as a condition of all purchasers of condominium units, that they also become contractually bound to a long term agreement to pay a monthly fee to a recreational business, which was owned by the corporate shareholders, Norman Cohen and Saul J. Morgan, in their individual capacity and as Trustees.

The recreational business is located on an approximately one-half acre location adjacent to the

condominium. The tie to the recreational business originally took the form of a non-exclusive 99 year leasehold but was converted later to a 30 year obligation, secured by the same 99 year non-exclusive lease.

All sales of the 650 residential condominium units at the Commodore Plaza Condominium project were initially and continue to be contractually tied to payments to the defendant(s) recreational business, whereby the unit owners and their successors are required, as a *contractual* condition of sale and continued ownership, to pay a monthly sum to the defendant(s), whether they patronize the defendant(s) recreation business or not. The condominium units are alleged to be the tying product and the unwanted recreation facilities are the tied product. At time of trial, the tied payments to the recreation business exceeded $450,000.00 per annum.

The corporate Defendant/Respondent, Saul J. Morgan Enterprises, Inc., (the name was later changed to Century 21 Commodore Plaza, Inc.), operated interstate and was engaged in the building and sale of dwelling units to purchasers in New York, Massachusetts, Florida and other States. Norman Cohen, and Saul J. Morgan, individually and as Trustees, who were also controlling stockholders of the vendor corporation, were also engaged in the recreational/leisure time activities business. Therefore, it is clear that at least *two* business categories were involved in the matter, (1) the sale of dwellings and (2) a separate recreation business.

This was an extremely large condominium project involving financing and sales in the millions of dollars, and originally planned for thousands of residential and commercial condominium units.

There were plans and advertisements for major entertainment facilities, at the project including theatres, bowling alleys, health spas, tennis courts, a luxury motel, golf course and floating restaurant, etc. as was shown by undisputed evidence at the trial below. The project was unquestionably unique.

It was also undisputed that customers for the development were to be and were in fact drawn from New York, Massachusetts and other states as well as from the State of Florida. Undisputed evidence below showed that sales efforts for this project were conducted by company representatives in New York, Massachusetts and elsewhere, although the project was located in Dade County, Florida.

Brochures and other mailings were sent through the United States mails to out of state purchasers and prospective purchasers. Interstate telephone calls were made on a regular basis.

Advertisements were placed in various nationally distributed newspapers, and magazines, including Aloft Magazine, distributed nationally by National Airlines and placed in interstate travel via airplanes to other states. Advertising also appeared in the New York Times, directed at non-Florida residents.

Economic forecasting and planning was done by firms in the states of New Jersey and Pennsylvania.

Bulk sales of condominium units for investment purposes were made to a New York corporation, 39 Cortlandt Associates, Inc., for a sum in excess of $1,000,000.00. Sales of individual dwelling units to out

of state buyers and Floridians exceeded Twenty Million ($20,000,000.00) Dollars. Millions of dollars in construction materials and monies were shown to have moved interstate.

The controlling documents evidencing the tying arrangement were signed, in part, in New York and sent to Florida. Norman Cohen, respondent, was a New York resident at the time.

The recreational business, at time of trial, was billing in excess of Four Hundred Fifty Thousand ($450,000.00) Dollars per year to the owners of the "tied" condominium dwellings. By its terms, the tying agreement had required payment of millions of dollars prior to the time of trial and thereafter.

In short, the undisputed evidence showed that the projects involved in the case *sub judice* encompassed substantial monies and interstate activities in both the sales of dwellings by the defendant(s) and the tied recreational businesses owned by the defendant(s). The total value of the "tied" recreational business was less than $100,000.00. Expert testimony showed that a competitive charge for the facilities would be less than $15,000.00 per year in a free market. Thus more than $400,000.00 in business was foreclosed to competitors each year and continues to be foreclosed.

The case seeking relief from the tying arrangement was originally filed in 1974 by Commodore Plaza At Century 21 Condominium Association, Inc. the corporate Condominium Association, which managed the affairs of the condominium, and acted as representative of the unit owners after the developing corporation, a defendant

herein, relinquished control of the condominium's affairs. It was also the nominal "lessee" on the tying contract, having been designated as such when the individual defendants controlled its affairs.

However, due to the decision in *Spitz, et al. vs. Buchwald, et al.*, 550 F.2d 1051 (5th Cir. 1977), the Trial Court determined that the corporate Condominium Association was not the proper party plaintiff, whereupon petitioners Moskowitz and Koltun, two of the Condominium owners suffering from the tying arrangement were permitted to proceed as plaintiffs. Class status was sought and denied, it is thought erroneously.

The case came to issue and was tried before a jury. The jury returned a verdict in favor of the Plaintiffs and awarded damages, finding, *inter alia*, that an illegal tie was proved and a *per se* violation of the Sherman Act had been proved.

The defendants moved for entry of Judgment N.O.V., which the Court granted, by summary Order, listing four reasons for its decision (App. 2). The Court stated that:

> 1. Plaintiffs failed to elicit the requisite proof on the existance of two distinct products and any finding of two distinct products implicit in the general verdict is contrary to the great weight of the evidence.
>
> 2. Plaintiffs failed to prove the existance of sufficient economic power in the tying market to coerce purchase of the tied product.

3. Plaintiffs failed to demonstrate any anticompetitive effect on any market.

4. The great weight of the evidence is to the effect that Plaintiffs were unable to establish a "not insubstantial amount of interstate commerce in the market insofar as they failed to prove the existance of the tied market which might be affected, i.e. the great weight of the evidence was that there was no tied market.

The court also granted a new trial in the event of reversal by the Appellate Court of the Judgment N.O.V. for the stated reason that, in the view of the Court, there was a lack of competent evidence to support the damages awarded by the jury and this in and of itself was sufficient to order a new trial (App. 2). The jury had awarded plaintiffs damages equal to what they had paid and would be required to pay as a result of the tie.

On appeal, the Eleventh Circuit Court of Appeals affirmed (App. 1) Judges Hill, Hatchett and Allgood (U. S. District Judge of the Northern District of Alabama, sitting by designation) comprising the panel. Rehearing en banc was requested and denied. (App. 3)

The appellate Court reasoned that plaintiffs failed to make any showing of coercion or anticompetitive effects and reasoned the fact finder cannot infer coercion or effect from the existance of a tie-in as Plaintiffs apparently contend (sic), citing *United States Steel Corp. vs. Fortner Enterprises*, 429 U.S. 610, 617-18 (1977) (Fortner II): *App. 2.*

"It is thus clear that the District Judge properly entered judgment N.O.V. and we therefore need not address Moskowitz and Koltun's contention that the Judge erred in entering judgment on the other grounds set forth."

Petitioners are of the view that the jury was correct in finding for plaintiffs and that the learned Trial Judge, and Appellate Judges were incorrect in determining that the tying arrangement demonstrated is not prohibited by the Sherman Act. The decision appears to be in direct conflict with the decisions of this Court.

ARGUMENT

ISSUE NO. 1

In a Sherman Act tying case, may a Plaintiff prove the element of coercion by showing an express contractual requirement by which the antitrust plaintiff's future course of action is governed and by which the antitrust plaintiff is compelled to purchase the tied product in the future only from the seller.

It is undisputed in the case *sub judice* that each and every of the 650 purchasers of dwelling units at the Commodore Plaza Condominium were required, *contractually*, to pay a monthly charge to the defendants recreation business *whether they patronized it or not*, as a condition of purchasing and owning a condominium dwelling unit. The total yearly cost to the putative class of owners exceeded $450,000.00 at the time of trial, in excess of a million dollars prior to the trial and

would require millions of dollars to be paid thereafter at the rate of $450,000.00 per year.

It is undisputed in the record below that recorded documents clearly showed this *contractual* requirement and that no exceptions were made from the tie as to any purchaser.

The evidence was undisputed that the *contractual* tying arrangement gives the owner of the recreational business a lien upon each purchaser's dwelling unit in order to enforce the monthly payments to the owner of the tied recreational business. This is in addition to other contractual coercions to enforce payment.

Thus, the future course of action of the purchaser/owner is limited and controlled by the *express contracts* and coercion which is found in the tying agreement itself as well as respondents' conduct.

The tying contracts also provide for *punitive* measures against the homeowner for non-compliance with the tying contract, ranging from loss of the dwelling, damages, and fines. The proofs showed the course of dealings of the defendants as well as the express contractual tying arrangement.

The Supreme Court of the United States has held that where one product is sold on the express contractual condition that the purchaser purchase another product in the future from the seller or at his direction, the purchaser's future course of action is limited by that contract, and coercion is found in the agreement itself. *Northern Pacific Railway Company vs. United States*, 356 U.S. 1, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), See

also: *Advance Business Systems and Supplies Company vs. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), cited with approval in *Response of Carolina, Inc. vs. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976) at 1328; *Carpa, Inc. vs. Ward*, 536 F.2d 39 (5th Cir. 1976).

The decision *sub judice* is in direct conflict with *Northern Pacific, supra* and *International Salt Co. vs. United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed.2d. The Eleventh Circuit has substituted a *different* test.

The *Fifth* Circuit treated this question in *Buckley Towers Condominium, Inc., et al. vs. Herbert Buchwald, et al.*, 533 F.2d 934 (5th Cir. 1976) *at 938*, (Dyer, Simpson and Fay presiding), an earlier condominium tying case, concerning *standing* to sue, wherein the Court stated that the District Court below had "correctly noted that the tied product is a recreational facility and the obligation to make rental payments on these facilities, and the tying products are the residential condominium units . . .". *Buckley Towers Condominium, Inc. vs. Buchwald, supra.* The recreational tying arrangement recited in *Buckley, supra* is similar to the one here. The *Eleventh* Circuit has apparently rejected the reasoning in *Buckley Towers, supra.*

The evil to our competitive economic system and foreclosure of substantial markets to competition is demonstrated by the conduct proved at the trial in the case *sub judice*, but sanctioned by the Eleventh Circuit.

When a person cannot buy or continue to own a home without being contractually required to sign a 99 year contract to pay exhorbitant and increasing monthly charges to the owner of a recreation business at an

inflated price, this should, in and of itself, be evidence of express contractual coercion. *Northern Pacific Railway, supra, International Salt, supra.*

In addition, where it is undisputed that the owner of the tied recreational business can utilize punitive measures, including exercising collateral liens permitting foreclosure of the victims home to enforce payment in the sum of $450,000.00 per year for the unwanted tied product, this too conclusively demonstrates coercion in the context of a per se antitrust violation and foreclosure of competition.

Respectfully, the District Court and the Eleventh Circuit Court of Appeals erred significantly in this regard and disregarded both the jury's factual findings and decisions of this Court and other Circuits as to proof of coercion for antitrust purposes.

ISSUE NO. 2

> Did the Eleventh Circuit Court of Appeals and the Trial Court err in finding that Plaintiffs did not demonstrate a sufficient showing of anti-competitive effects in the trial below by disregarding prior decisions of this Court and substituting a different standard than the one set by this Court.

Respectfully, the decision of the Eleventh Circuit Court of Appeals and the trial Court conflict irreconcilably with prior and recent decisions of the Supreme Court of the United States and other circuits on the issue of the required showing of anti-competitive effects.

The Supreme Court has held in *McClain vs. Real Estate Board of New Orleans, Inc.*, 100 S. Ct. 502 (1980) that a Sherman Act violation may be found in a civil action under the Sherman Act and liability established by the proof of either an unlawful purpose or an anti-competitive effect, citing *United States vs. United States Gypsum Company*, 98 S.Ct. 2864, 438 U.S. 422, 57 L.Ed.2d 854 (1978).

Petitioners presented proof below, including, but not limited to expert witness testimony, that millions of dollars in business was foreclosed to competitors of the tied recreation business as a result of the tying arrangement and that the seller of the dwelling units had sufficient economic power, with respect to the tying product (dwellings) to appreciably restrain free competition in the market for the tied product (recreation facilities). The jury was presented proofs on these points and found that the required standard of proof on this issue had been met. It also found that the tying company had a vested interest in the continuance of the tying arrangement. Pattern instructions were used and a general verdict was returned.

It was also shown that millions of dollars flowed *in commerce* as a result of the tying arrangement, and revenues in excess of $450,000.00 per year are foreclosed from competitors each year.

Additionally, construction materials in the millions of dollars moved in interstate commerce, people themselves travelled from other states to execute the coercive contracts, advertisements were utilized in national publications.

The Supreme Court of the United States has held that it is unreasonable *per se* by use of a tying arrangement to foreclose competitors from any substantial market. *Northern Pacific Railway, supra.* In *Northern Pacific* is was noted by reference to *International Salt, supra,* that it was not necessary to establish that equivalent (machines) were unobtainable nor was it necessary to show what *proportion* of the market was controlled by the Defendant, and it was irrelevant that there was no evidence as to the *actual effect* of the tying clauses upon competition. *Northern Pacific Railway, supra at 520.* See also: *Standard Oil of California and Standard Stations vs. United States,* 337 U.S. 293, 305, 69 S.Ct. 1051, 1058, 93 L. Ed. 1371.

In the case sub judice, it was shown that millions of dollars in total business was foreclosed to competitors by virtue of the tying arrangement and, it was shown that the activities of the defendants occured *in commerce* and it was shown that the Seller of the tying products had sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. Expert and other testimony also clearly showed that payment for both the tied and tying products exceeded by far, their combined fair market value. An enormous overcharge for the complete "package" price of the two products was proved to and found by the jury. It was proved that alternatives to the tied product were available at vastly lower cost but could not be utilized, due to the restraint imposed by the express contractual tie and foreclosure of competition.

Disregarding the jury verdict in favor of Plantiffs, the Trial and Appellate Judges found that $450,000.00

per annum in dollar volume foreclosed to competitors was not sufficient to appreciably affect commerce.

It was conclusively shown that the value of the tied recreational facilities *in toto*, did not exceed $15,000.00 yearly and the *combined* value of both the individual homes and the "tied" recreational facilities were far less than the total artificially inflated cost to the plaintiffs and the other homeowners subjected to the tie.

The case is of some importance since, like *McClain*, *supra*, and *Goldfarb*, it involves the purchase of a necessity of life, a dwelling, but involves far more pernicious effects.

People in America can expect, as a minimum, the opportunity to purchase a home in which to reside at a competitive cost and a free market for leisure time recreational facilities.

Traditionally, home purchases have been both regulated and encouraged by Congress and it has been found to be a desirable goal of our economic system.

Here, it is undisputed that 650 dwellings at a multimillion dollar complex were sold *only* upon the express contractual provision that the home purchasers also agree by virtue of the sales contract and incorporated ancillary agreement, to become unwilling patrons and subsidizers of a tied recreation business, at a total cost far in excess of the combined value of the "tied package". The jury found the two products to be separate and distinct products.

There have been a number of condominium cases which have attempted to present these issues for determination. See: *Chatham Condominium Association vs. Century Village, Inc., et al.*, 597 F.2d 1002 (5th Cir. 1979), *Buckley Towers Condominium, Inc. vs. Buchwald*, 533 F.2d 934 (5th Cir. 1976), cert. den. 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed. 2d 571 (1977), *Spitz vs. Buchwald, et al.*, 551 F.2d 1051 (5th Cir. 1977), *Imperial Point Colonnades Condominium, Inc. vs Mangurian, et al.*, 549 F.2d 1029 (5th Cir. 1977), *Miller vs. Granados*, 529 F.2d 393 (5th Cir. 1976), *Burleigh House Condominium, et al. vs. Buchwald, et al.*, 546 F.2d 57 (5th Cir. 1977).

The case *sub judice* appears to be the first case which was permitted to proceed to jury trial and it resulted in a clear jury verdict in favor of the Plaintiffs, finding the tying arrangement to constitute a *per se* violation of the federal antitrust laws.

It is quite appropriate and extremely important that this Court grant certiorari to permit full briefing on the issues to explore the practice of tying unwanted products or services to the sale of residential dwellings.

Such arrangements foreclose millions of dollars in business to competitors, and require home purchasers to pay far in excess of the *combined* fair market value of both products.

If such arrangements are permissible under the antitrust laws of the United States, then the standard for *per se* violations applied to other segments of our economy are not applicable to the home building industry and may erode per se standards in other industries as

well, in clear disregard of *precedent* in this Court, as is argued here.

On the other hand, if as the Eleventh Circuit appears to indicate this Court has *receded* from its pronouncements and rationale in *Northern Pacific, supra, Goldfarb vs. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) and *McClain, et al. vs. Real Estate Board of New Orleans, supra,* then this Court should issue a determinative opinion delineating the applicable standards in this area of antitrust law.

If these tying practices are permissible, then the era of affordable housing in America is now at an end, both for the reason that unrelated products or services can be tied to the sale of the home at highly inflated cost, exceeding the combined value of the "package". Competition is also inevitably affected and foreclosed for the reason that the tying device can now be utilized to avoid federal and state regulation of mortgage financing, and can artificially obscure the true cost of both homes and financing of homes, and competitors in the market for the tied products are foreclosed from substantial markets as a result of the tie.

The Court should exercise discretion in favor of granting the Writ.

CONCLUSION

There should be no question that the matters concerned in this petition are of great public interest and involve significant restraints upon commerce. It would also appear that the decisions below depart drastically from settled principles of *per se* antitrust law as announced by this Court.

The Eleventh Circuit's apparent rejection of this Court's previous decisions in *Northern Pacific Railway, McClain,* and *Goldfarb vs. Virginia State Bar,* would appear to be compelling reason for the granting the Writ.

Respectfully, Petitioners Writ of Certiorari should be granted.

Respectfully submitted:

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By: /s/ J. S. Paglino
Joseph S. Paglino, Esq.

CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing was mailed this 11th day of April, 1984 to Gerald F. Richman, Esq., Floyd Pearson, et al., 25th Floor One Biscayne Tower, Miami, Florida 33131, Counsel for Respondents.

By: /s/ J. S. Paglino
Joseph S. Paglino, Esq.
Counsel for Petitioners

Appendix

APPENDIX

App. 1—Opinion of the Eleventh Circuit Court of Appeals dated January 27, 1984

App. 2—Order Granting Judgment Notwithstanding the Verdict or, in the Alternative Granting New Trial

App. 3—Order of the Eleventh Circuit Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc dated March 8, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-5832

COMMODORE PLAZA AT CENTURY 21
CONDOMINIUM ASSOCIATION, INC., et al.,

Plaintiffs,

FRED MOSKOWITZ, CLARENCE KOLTUN,

Plaintiffs-Appellants,

versus

SAUL J. MORGAN ENTERPRISES, INC., et al., etc.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

(January 27, 1984)

Before HILL and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

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*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

Plaintiffs Fred Moskowitz and Clarence Koltun appeal from the order of the district court granting judgment n.o.v. to the defendants in this case. Moskowitz and Koltun also challenge the order of the district court refusing to certify their lawsuit as a class action. We hold that the district court properly resolved both issues and affirm.

This case presents a factual situation similar to one the predecessor to this court encountered in *Chatham Condominium Associations v. Century Village, Inc.*, 597 F.2d 1002 (5th Cir. 1979). In both cases, the plaintiffs alleged that condominium vendors violated the antitrust prohibition against tying arrangements by requiring purchasers of condominiums to lease an individual interest in common areas in connection with their purchase. This case differs from *Chatham*, however. In *Chatham* we reviewed an order dismissing the case for lack of jurisdiction; here we review an order granting judgment n.o.v.

In issuing his order, the district judge held that Moskowitz and Koltun failed to: (1) prove the existence of two legally cognizable separate and distinct products; (2) prove that defendants possessed economic power in the tying product market; (3) prove anticompetive effects; and (4) prove an effect on interstate commerce. In order to establish the existence of an illegal tying arrangement, each element (and others) must be shown by the plaintiff. *See Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974). In this case, as in *Driskill*, the plaintiffs failed to make any showing of coercion or anticompetive effects, *see id.* at 323, and the factfinder cannot infer coercion or effect from the

existence of a tie-in, as plaintiffs apparently contend, *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 617-18 (1977) (*Fortner* II). It is thus clear that the district judge properly entered judgment n.o.v. and we therefore need not address Moskowitz' and Koltun's contentions that the judge erred in entering judgment on the other grounds set forth.

We also find no error in the judge's order denying class certification. The judgment is

AFFIRMED.

[Rec'd 7-1-82]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 74-570-Civ-JWK

FRED MOSKOWITZ and CLARENCE KOLTUN,

Plaintiffs,

vs.

SAUL J. MORGAN ENTERPRISES, INC., et. al.,

Defendants.

ORDER GRANTING JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE GRANTING NEW TRIAL

This cause came on to be heard on defendants' motion for judgment notwithstanding the verdict and to order judgment for defendants in accordance with defendants' previous motion for directed verdict or, in the alternative, for a new trial. The court having carefully reviewed the file and the extensive memoranda filed by the parties, and being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED that the verdict for plaintiffs be and the same is hereby set aside and that judgment be and the same is hereby entered in favor of defendants on the grounds that the verdict is contrary to the great weight of the evidence and that

the facts and inferences point so strongly in favor of defendants that the court believes that reasonable persons could not arrive at a verdict for plaintiffs. See, e.g., *Conway v. Chemical Seaman Tank Lines*, 610 F.2d 360 (5th Cir. 1980); *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969). Specifically, the court finds:

1. Plaintiffs failed to elicit the requisite proof on the existence of two distinct products and any finding of two distinct products implicit in the general verdict is contrary to the great weight of the evidence.

Plaintiffs contended that certain portions of the lower and smaller of two pool decks at Commodore Plaza Condominium (Commodore) which was subject to a 99 year lease constituted a separate and distinct product from the purchase of a condominium unit together with a prorata share of the common elements at Commodore which common elements included a much larger pool, pool deck, and other facilities.

Plaintiffs at trial suggested that the leased portion of the facilities was merely excess and surplusage in light of the other substantial facilities that were part of the common elements. Plaintiffs' experts testified that there is no competing market for the leased area. The great weight of the evidence demonstrated that as to the leased area any meaningful connection to recreation was little more than pleasantly coicidental to defendants and was irrelevant to plaintiffs. *Levinson v. Maison Grande, Inc.*, 517 F.Supp. 963 (S.D. Fla. 1981) (appeal pending). Those items which were made subject to the lease, i.e., the smaller of two swimming pools, a divided covered area, one portion of which is on land subject to the lease while the remainder is on land owned in fee

by the unit owners, and a small putting green, do not constitute a product separate and distinct from the condominium units themselves or from a condominium leisure living package. Further, the items subject to the lease do not render the leased area a "club." *Chatham Condominium Association v. Century Village, Inc.*, 597 F.2d 1002 (5th Cir. 1979).

2. Plaintiffs failed to prove the existence of sufficient economic power in the tying marking to coerce purchase of the tied product. The alleged tie-in arrangement neither foreclosed the typing party's competitors from a segment of the tied product market nor did it deprive the alleged tie's victims of the advantages of shopping around. Thus the arrangement exhibits neither of the two principal evils of tie-in arrangements. *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977).

The great weight of the evidence was clearly to the effect that the markets for condominium units in the North Dade area or the Dade, Broward, and Palm Beach County areas were highly competitive and that the requisite economic power or dominance was not possessed by defendant in any relevant market. See, e.g., *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977); and *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978).

3. Plaintiffs failed to demonstrate any anti-competitive on any market. Plaintiffs' experts conceded at trial that the portion of the facilities subject to the lease at Commodore was not in competition with any

other such facilities and that no competitor was foreclosed in the relevant market area by the imposition of the lease in this case. Under the circumstances, there was virtually no effect, anti-competitive or otherwise, on any market. There was no evidence of any buyers forced to forego free choice between competing products. See, e.g., *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958).

4. The great weight of the evidence is to the effect that plaintiffs were unable to establish a "not insubstantial" amount of interstate commerce in the tied market insofar as they failed to prove the existence of a tied market which might be so effected, i.e., the great weight of the evidence was that there was no tied market.

With regard to defendants' motion for new trial, the court finds that the verdict is against the clear weight of the evidence with regard to all of the issues discussed above. See, e.g., *Weyerhauser Co. v. Bucon Construction Co.*, 430 F.2d 869 (5th Cir. 1967). Additionally, the court finds that the jury's award of damages was without basis in law or fact. The lack of competent evidence to support the damages awarded by the jury is sufficient cause to order a new trial. See, e.g., *Richardson v. Communication Workers of America, AFL-CIO*, 530 F.2d 126 (5th Cir. 1976).

Accordingly, it is further

ORDERED AND ADJUDGED that defendants' motion for new trial be and the same is hereby granted, this ruling granting defendants' motion for new trial to

take effect *only* in the event that the ruling of the court on defendant's motion for judgment notwithstanding the verdict is reversed on appeal.

It is further

ORDERED AND ADJUDGED that this court retain jurisdiction to award costs to defendants in an amount to be determined by the court upon proper motion.

DONE AND ORDERED in chambers at Miami, Florida, this 25th day of June, 1982.

/s/ James W. Kehoe

JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

CC: All Counsel

[FILED MAR 8 1984]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5832

COMMODORE PLAZA AT CENTURY 21
CONDOMINIUM ASSOCIATION, INC., ET AL,

Plaintiffs,

FRED MOSKOWITZ, CLARENCE KOLTUN,

Plaintiffs-Appellants,

versus

SAUL J. MORGAN ENTERPRISES, INC.,
ET AL., ETC.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

**ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC**

(Opinion JANUARY 27, 11 Cir., 1984, ____ F.2d ____).

(MAR 8 1984)

Before HILL, HATCHETT, Circuit Judges, and
ALLGOOD*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JAMES C. HILL
United States Circuit Judge

*HON. Clarence Allgood, U.S. District Judge, for the Northern District of Alabama, sitting by designation

United States Court of Appeals
For the Eleventh Circuit

No. 82-5832

D.C. Docket No. 74-00570

COMMODORE PLAZA AT CENTURY 21 CONDOMINIUM ASSOCIATION, INC., et al,

Plaintiffs,

FRED MOSKOWITZ, CLARENCE KOLTUN,

Plaintiffs-Appellants,

versus

SAUL J. MORGAN ENTERPRISES, INC., etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before HILL and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: January 27, 1984
For the Court: Spencer D. Mercer, Clerk

ISSUED AS MANDATE:
By: /s/ [illegible]
Deputy Clerk